

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Chops Holdings, LLC,
Appellant,

v.

Douglas County Board of Equalization,
Appellee

Case No: 12C 770

Decision and Order Affirming the
Determination of the Douglas County Board
of Equalization

For the Appellant:

David Paladino,
Member, Chops Holdings, LLC.

For the Appellee:

Malina Dobson,
Deputy Douglas County Attorney.

This appeal was heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property is a parcel improved with an 8,816 square foot three-unit apartment complex located at 3819 Farnam Street, Omaha, Douglas County, Nebraska. The legal description and property record card for the Subject Property are found at Exhibit 164.

II. PROCEDURAL HISTORY

The Douglas County Assessor (the Assessor) determined that the assessed value of Subject Property was \$74,300 for tax year 2012.¹ Chops Holdings, LLC (the Taxpayer) protested this assessment to the Douglas County Board of Equalization (the County Board) and requested an assessed value of \$38,000.² The County Board determined that the taxable value for tax year 2012 was \$74,300.³

The Taxpayer appealed the decision of the County Board to the Tax Equalization and Review Commission (the Commission). The Commission held a hearing on November 18, 2014.

¹ See, E4.

² See, E164:35.

³ See, E4.

III. STANDARD OF REVIEW

The Commission's review of the determination by a County Board of Equalization is de novo.⁴ When the Commission considers an appeal of a decision of a County Board of Equalization, a presumption exists that the "board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action."⁵

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.⁶

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.⁷ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁸ A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued.⁹ The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.¹⁰

In an appeal, the commission "may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or

⁴ See, Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal." *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

⁵ *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

⁶ *Id.*

⁷ Neb. Rev. Stat. §77-5016(8)(2014 Cum. Supp.).

⁸ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁹ Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value).

¹⁰ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

cross appeal.”¹¹ The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”¹² The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹³

IV. VALUATION

A. Applicable Law

Under Nebraska law,

[a]ctual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.¹⁴

“Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.”¹⁵ “Actual value, market value, and fair market value mean exactly the same thing.”¹⁶ Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.¹⁷ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁸ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁹

¹¹ Neb. Rev. Stat. §77-5016(8) (2014 Cum. Supp.).

¹² Neb. Rev. Stat. §77-5016(6) (2014 Cum. Supp.).

¹³ Neb. Rev. Stat. §77-5018(1) (2014 Cum. Supp.).

¹⁴ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹⁵ *Id.*

¹⁶ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁷ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁸ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁹ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

B. Summary of the Evidence

David Paladino, Member of Chops Holdings, LLC, testified on behalf of the Taxpayer. He testified that the Subject Property consisted of nearly 9,000 square feet, divided into three living units. Each unit contained six bedrooms, generally rented to college aged students. Paladino asserted that the County Board did not adequately account for limited off-street parking at the Subject Property because the Subject Property often commands up to 18 residents, each with a personal vehicle. He testified that on-street parking is only allowed on the South side of Farnam Street and on the East side of 38th Street, creating a significant limitation for adjacent curbside parking. He opined that the lack of parking affects the actual value of the Subject Property but he did not quantify this effect.

Paladino testified that he generally rents each unit for \$900 per month, but rents have varied and he has received up to \$1,300 per unit. Paladino was unable to testify as to the actual rent received or the actual occupancy as of January 1, 2012.

Paladino opined that when using an income approach to value the Subject Property, the applicable expense ratio should be 75%. Paladino opined that the capitalization rate should be as high as 15% in order to account for the limited parking and deferred maintenance, including broken floor joists and damage caused by foundation settling. The Commission notes that when using Paladino's income approach factors the result would be a value of \$50,760.²⁰ However, Paladino also opined that the actual value of the Subject Property was \$38,000. Paladino further opined that the condition of the Subject Property should be rated as worn out rather than as poor.

Mark Jenkins, a commercial staff appraiser with the Assessor, was called to testify by the Taxpayer.²¹ Jenkins testified that he was directly involved in determining the assessed value for the Subject Property for tax year 2012. He asserted that for purposes of applying a mass appraisal model to the Subject Property for tax year 2012, the Assessor had assigned a quality rating of average and a condition rating of poor. Jenkins testified that condition ratings are generally based on an inspection and on speaking with the owner concerning any elements of deferred maintenance. He testified that he inspected the Subject Property on January 18, 2013,

²⁰ Rental rate \$32,400 (\$900 x 3 units x 12 months), Vacancy & Collection Loss rate 6%, Expense ratio 75%, Capitalization rate 15%: (\$32,400 x .94 x .25 / .15)

²¹ Jenkins testified he had previously been a licensed realtor and had previously worked 15 years as a real estate paralegal.

after the date of the assessment, and he opined that the Subject Property was not in worn out condition because of interior renovations.

Jenkins testified that the amount of available parking is not considered in the mass appraisal model and that given the Subject Property's location the amount of off street parking would have no effect on the Subject Property's actual value. He asserted that there was curbside parking available, and that given the demographics of the residents in the Subject Property's neighborhood it was likely that only a few potential renters required parking. Jenkins also testified that the proximity of the Subject Property to a busy street may be considered in the model but any negative affect would be attributed to the value of the land component of the Subject Property.

The Assessment Report contains both an income approach value of \$110,800, and a cost approach value of \$263,900.²² Jenkins testified that some of the difference between the two values was likely related to the fact that the income approach did not include the attic space as rentable area. Jenkins did not express an opinion of the correct area for either calculation. Jenkins testified that the reconciled value of \$74,300 was equal to a County Board determination of the actual value of the Subject Property in 2008 when the Subject Property's condition may have been inferior and there may have been higher vacancy rates in the applicable market.²³ The actual value of \$74,300 was first assigned to the Subject Property after a reappraisal in 2000.²⁴

Jenkins testified that the Subject Property was reappraised in 2008, but that the County Board determined that the taxable value determination of \$74,300 should be retained, even though that value was first determined in the reappraisal for tax year 2000.²⁵ He asserted that the County Board's determination actually resulted in an underassessment, and he opined that the actual value of the Subject Property should be higher than \$74,300.

Jenkins asserted that based on the size of the apartments \$900 for rent would not be typical for the market, and if the tenants were paying expenses then a 75% income approach expense ratio would not be typical for the market. He asserted that the rent would typically be higher than \$900 and that the expenses would typically be lower than 75%.

²² See, E164:18.

²³ See, E164:19.

²⁴ See, E164:19.

²⁵ See, E164:19.

C. Analysis

The Taxpayer must overcome by competent evidence a presumption in favor of the County Board.²⁶ Competent evidence is relevant and material evidence or that evidence “which the very nature of the thing to be proven requires.”²⁷ A taxpayer must introduce competent evidence of actual value in order to successfully claim that a property is overvalued.²⁸ An owner who is familiar with his property and knows its worth is permitted to testify as to its actual value.²⁹

David Paladino testified concerning his opinions of the appropriate income approach factors for the Subject Property for tax year 2012 based upon both what he asserted was typical in the market and upon the Subject Property’s actual factors. These factors differed from the factors shown in the Assessment Report prepared by the Assessor. The Assessment Report provides a cost approach, which indicates an actual value of \$263,900,³⁰ and an income approach, which indicates an actual value of \$110,800.³¹ However, the Assessor did not rely upon the indications of value derived from the income approach or the cost approach, but instead adopted a value of \$74,300.³² Jenkins testified that the \$74,300 value was derived from a mass appraisal model value of the Subject Property for tax year 2000, and was carried forward by the County Board following a reappraisal in 2008.³³ Jenkins asserted that the actual value of the Subject Property should be higher than \$74,300. The Commission finds that the Taxpayer’s opinions of assessed value, the approaches to value in the Assessment Report, and Jenkins’ opinion of value amount to competent evidence to rebut the presumption in favor of the County Board’s determination of taxable value.

The Taxpayer must also meet its burden to show that the County Board’s determination was arbitrary or unreasonable.³⁴ A mere difference of opinion is insufficient to meet the Taxpayer’s burden.³⁵

²⁶ See, *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 825 N.W.2d 447 (2013).

²⁷ *Black’s Law Dictionary 6th Edition*, West Group, p. 284 (1990).

²⁸ See, *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N. W. 2d 515 (1981).

²⁹ See, *U. S. Ecology v. Boyd County Bd. of Equal.*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).

³⁰ See, E164:18.

³¹ See, E164:18.

³² See, E164:18.

³³ See, E164:19.

³⁴ See, *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 124-25, 825 N.W.2d 447, 452 (2013).

³⁵ See, *JQH La Vista Conference Center Development LLC v. Sarpy County Board of Equalization*, 285 Neb. 120, 125-26, 825 N.W.2d 447, 452 (2013).

Several opinions of value were presented at the hearing. The Assessment Report included a cost approach summary and an income approach worksheet,³⁶ however, the Assessor chose not to rely upon these calculations and instead reverted to a County Board determination from 2008 based upon market data from more than six years before the assessment date.³⁷ Jenkins testified that the Subject Property's actual value should be greater than the County Board's determination, but he did not express a quantified opinion of value. Further, Jenkins indicated that the difference between the income approach value and the cost approach value was due in large part to the difference in area used in the two calculations. However, Jenkins did not give an opinion of the correct area for either calculation.

Paladino's opinion of value of \$38,000 was inconsistent with an opinion of value derived from his income approach factors that would have resulted in a taxable value of \$50,760.

The statutory burden rests on the Taxpayer to produce clear and convincing evidence that the County Board's determination was arbitrary or unreasonable. Clear and convincing evidence is "that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."³⁸

The opinions of value offered in this appeal ranged from \$38,000 to \$263,900. However, none of the opinions of value presented in this appeal constituted clear and convincing evidence of the actual value of the Subject Property.

The Commission finds that there is persuasive evidence that the method used by the County Board to determine the taxable value of the Subject Property was unreasonable, since it was based upon a mass appraisal model relying upon market data from more than six years before the assessment date. However, attacking the County Board's method for reaching its determination does not meet the requisite burden.³⁹ The Commission further finds there is no persuasive evidence in this appeal of the actual value of the Subject Property.

³⁶ E164:9, E164:16.

³⁷ E164:19.

³⁸ *State v. Payne-McCoy*, 284 Neb. 302, 308, 818 N.W.2d 608, 616 (2012) (Citing *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009)).

³⁹ *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

V. CONCLUSION

There is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determination. However, there is not clear and convincing evidence that the County Board's determination of taxable value was arbitrary or unreasonable. Further, no evidence in this appeal constitutes persuasive evidence of the actual value of the Subject Property. For all of the reasons set forth above, the determination of the taxable value of the Subject Property by the County Board must be affirmed.

VI. ORDER

IT IS ORDERED THAT:

1. The decision of the Douglas County Board of Equalization determining the value of the Subject Property for tax year 2012 is affirmed.
2. The taxable value of the Subject Property for tax year 2012 is \$74,300.
3. This Decision and Order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2014 Cum. Supp.).
4. Any request for relief, by any party, which is not specifically provided for by this Decision and Order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This Decision and Order shall only be applicable to tax year 2012.
7. This Decision and Order is effective for purposes of appeal on January 7, 2015.⁴⁰

Signed and Sealed: January 7, 2015

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

⁴⁰ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2014 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.